SUPREME COURT, U. S.

FILED

APR 13 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-707

ARTHUR SANDERS, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF GEORGIA

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Georgia entered in the above case on June 2, 1975.

OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at 234 Ga. 586, 216 S.E.2d 838, and is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Supreme Court of Georgia was entered on June 2, 1975. An application for rehearing was timely filed and denied on June 17, 1975. On August 29, 1975, Mr. Justice Powell granted an extension of time to and including November 14, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code* § *1257(3).*

QUESTIONS PRESENTED

1. Whether a jury comprised of five persons is sufficient to afford to an accused in a criminal prosecution the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether the motion picture film "Deep Throat" can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth, and Fourteenth Amendments to the United States Constitution, as

well as Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* § *2-5101*) and an Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-1891, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) are set forth in Appendix B Hereto.

STATEMENT

The Petitioner herein was charged in the Criminal Court of Fulton County with two counts of violating the State obscenity statute, *Georgia Code Annotated* § *26-2101*. The charges were based upon two exhibitions of a single motion picture film entitled "Deep Throat." The charges were based upon exhibition of this allegedly obscene film at the Gay Paree Theatre in Atlanta, Georgia, on August 31, 1973, and on September 5, 1973.

The case came to trial on May 13, 1974. Pursuant to the provisions of the Georgia Constitution and statutes here challenged, Petitioner was tried by a jury comprised of five persons. That jury found the Petitioner guilty on both counts of the accusation. Petitioner was subsequently sentenced to a term of imprisonment for two years (two 12-month sentences to be served consecutively) and to fines in the amount of $2,000.00. The judgment of conviction was affirmed in the Georgia Court of Appeals and in the Georgia Supreme Court in an opinion and judgment for which review is sought in this Petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS FOR REVIEW AN ISSUE EXPRESSLY RESERVED BY THIS COURT IN *WILLIAMS V. FLORIDA*, 399 U.S. 78 (1970) – THE MINIMUM NUMBER OF JURORS REQUIRED TO GUARANTEE THE CONSTITUTIONAL RIGHT TO JURY TRIAL IN CRIMINAL CASES.

The as yet undecided status of the issue here presented for review – the minimum number of jurors necessary to guarantee the constitutional right to a trial by jury in criminal matter – was explicitly recognized in *Williams v. Florida*, 399 U.S. 78 (1970). The *Williams* case presented two issues of major import, one of them dealing with the Sixth Amendment right to jury trials as applied to the States through the Fourteenth Amendment.

Williams was convicted of robbery in a Florida State Court, his judgment of conviction being predicated upon a verdict of guilty returned by a six-person jury. Prior to his trial, Williams had sought to empanel a twelve-person jury, challenging the Florida State statute which provides for six person juries in all but capital cases. His motion was denied and the issue of the constitutionality of juries comprised of less than twelve persons was therefore presented in this Court.

The Court first of all noted that the Sixth Amendment right to trial by jury in criminal cases had been made applicable to the States through the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). It was noted that, pursuant

to *Duncan*, the Fourteenth Amendment guarantees an accused in state criminal trials the right to a jury in all cases which would invoke such a right if tried in federal court. Williams' robbery trial clearly fell within the scope of the *Duncan* holding. See *Baldwin v. New York*, 399 U.S. 66 (1970) and *De Stefano v. Woods*, 392 U.S. 631 (1968).

Having noted that the Sixth Amendment right to jury trial in criminal matters was thus applicable, this Court went on to decide whether that concept of "trial by jury" necessarily required a state jury of twelve persons:

> "The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number – in this case, 6." 399 U.S., at 86.

The Court rejected the Petitioner's contention and held that, in order to adequately guarantee the constitutional right to jury trial in criminal matters, States need not provide for juries of exactly twelve persons:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to empanel more than 6 members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth." *Id.*

In thus deciding that a twelve-person jury is not constitutionally mandated, however, this Court did not determine what minimum number would be required to guarantee this Sixth Amendment right. Indeed, that question was expressly reserved:

> "We have no occasion in this case to determine what minimum member can still constitute a 'jury,' but we do not doubt that 6 is above that minimum." 399 U.S., at 91 n.28.

The fact that the question was left unresolved in *Williams* was expressly noted by the Georgia Supreme Court in rejecting Petitioner's argument in this case. The failure of this Court to determine what minimum number can still constitute a "jury" was cited below as, *inter alia*, the justification for rejection of Petitioner's argument at the State level:

> "The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92, 90 S. Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts." 234 Ga. 586, 216 S.E.2d 838.

The instant Petition squarely presents the issue for final resolution by this Court. Whatever the outcome, it is respectfully submitted that the open-ended uncertainty precipitated by the *Williams* footnote should be eliminated. As was noted by Mr. Justice Harlan in *Williams, supra:*

> "The court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty . . . . The uncertainty that will henceforth plague the meaning of trial by jury is itself a

> further sufficient reason for not hoisting the anchor to history." 399 U.S., at 126.

It is also necessary to delineate the minimum number required to safeguard the Sixth Amendment guarantee of trial by jury in order to eliminate the "slippery slope" recognized by the Court in *Williams, supra:*

> "The *Thompson* opinion also reasoned that if a jury can be reduced from 12 to eight, then there was nothing to prevent its similarly being reduced to four or two or even zero, thus dispensing with the jury altogether. See 170 US at 353, 42 L Ed at 1067. That bit of logic, resurrected today in Mr. Justice Harlan's concurring opinion, post, at 126, 26 L Ed 2d at 468, suffers somewhat as soon as one recognizes that he can get off the slippery slope before he reaches the bottom." 399 U.S., at 91 n.28.

When viewed in light of the purposes of the jury trial right, it cannot be doubted that the jury of five provided for the Petitioner in this case was insufficient. It has been recognized that among the purposes of a jury trial in criminal matters is that of interposing members of the community between corrupt or overzealous prosecutors and compliant judges:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

This purpose was expounded upon by this Court in *Williams* which noted that the jury also serves the purpose of providing the common sense judgment of the community:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum, did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting. Statistical studies subsequent to the *Williams* decision have adequately established that smaller juries are significantly less representative of minority positions. *See, e.g.*, Zeisel, *The Waning of the American Jury*, 58 A.B.A. Journal 367; Diamond, *A Jury Experiment Reanalyzed*, 7 Mich. Journal of Law Reform 520; Zeisel and Diamond, *Convincing Empirical Evidence*, 41 University of Chicago Law Review 281.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence. Group deliberation and group dynamics necessitate at least the six person minimum found constitutionally acceptable in *Williams*.

II.

THE MOTION PICTURE FILM "DEEP THROAT" UPON WHICH PETITIONER'S CONVICTION RESTS IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT CONSTITUTES EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of

obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, states:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 US, at 497-498, 1 L ed 2d at 1541, 1515 (separate opinion). Such an issue, we think, must

> ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., at 498, 1 L ed 2d at 1514; see Manual Enterprises, Inc. v. Day, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute

founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finidng that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Deep Throat" upon whick Petitioner's conviction rests.

It should be noted that the failure of certain lower courts to perform the duty of independent review enunciated in *Manual Enterprises, Jacobellis* and *Jenkins* has once again placed the issue before this Court. In *United States v. Marks,* 520 F.2d 913 (CA 6 1975), the Court of Appeals for the Sixth Circuit affirmed an obscenity conviction involving, *inter alia,* the motion picture film "Deep Throat," for which review is sought here. In thus affirming, however, the Court failed to review the materials which formed the basis for the conviction. 520 F.2d, at 923 n.1. This is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Clicque v. United States,* 514 F.2d 923 (CA 5 1975). In *Clicque,* the Fifth Circuit reaffirmed and followed the mandate of independent appellate review, holding it applicable even in cases involving guilty pleas.

The issue of independent appellate review and the conflict in the Circuits which it has generated will be presented to this Court in a Petition for Writ of Certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals in *United States v. Marks, supra.* Mr. Justice Stewart has granted an extension of time within which to file such a Petition to and including November 14, 1975. *Stanley Mark, et al. v. United States,* No. A-307. This Court may thus wish to defer

determination of the instant Petition pending resolution of the Petition in *Marks, supra.*

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"): *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California,* 400 U.S. 922 (1970).

When the nationally acclaimed motion picture film "Deep Throat" is considered as a whole and judged against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that the film constitutes protected speech under the First and Fourteenth Amendments to the Constitution of the United States. It should be so held and Petitioner's conviction should thus be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX A

Arthur SANDERS, Jr.

v.

The STATE.

No. 29842.

Supreme Court of Georgia.

June 2, 1975.

Rehearing Denied June 17, 1975.

INGRAM, Justice.

[1] The film, "Deep Throat," is here for review of the trial court's judgment that it is obscene. This court has viewed the film and considered the enumerations of error. In our judgment, the film is obscene as a matter of law and fact.

[2] Appellant's motion for a trial by a jury of not less than twelve jurors was properly denied by the trial court. Only five jurors are required by statute for the trial of misdemeanor cases in the Criminal Court of Fulton County. See Ga.L. 1890–91, Vol. 2, p. 935, as amended by Ga.L. 1935, p. 498. The present Constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the superior court where twelve jurors are mandatory. See Code Ann. § 2-5101, Const. art. VI, § XVI, par. 1.

[3] Appellant also argues that a jury of five persons is "constitutionally inadequate" because it denies him equal protection of the law. We reject this argument in view of Georgia authority to the contrary. See, *McIntyre v. State,* 190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United

States has not determined what minimum number of jurors can still constitute a "jury." In Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn.28) it is observed "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts.

We find no error for any reason enumerated and argued in this appeal and affirm the trial court. See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (cert. denied by U.S. Supreme Court April 28, 1975).

Judgment affirmed.

All the Justices concur, except GUNTER, J., who concurs in the judgment only.

APPENDIX B

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* § *2-5101*) provides:

   "The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

5. An Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-1891, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) provides in pertinent part:

"[T]he jury in [Fulton] County shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four strikes and the State three and the five remaining jurors shall compose the jury."